

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

KEVION D. LYMAN,

Defendant and Appellant.

B301846

(Los Angeles County
Super. Ct. No. TA037614-01)

APPEAL from an order of the Superior Court of
Los Angeles County, Laura R. Walton, Judge. Affirmed.

Eric R. Larson, under appointment by the Court of Appeal,
for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Kevion D. Lyman appeals from a postjudgment order summarily denying his petition for resentencing under Penal Code section 1170.95.¹ No meritorious issues have been identified by Lyman's appointed counsel following his review of the record or by our own independent review of the record. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A jury in 1998 convicted Lyman of first degree murder (§ 187, subd. (a)) and found true the special circumstance allegation that the murder had been committed while engaged in a robbery (§ 190.2, subd. (a)(17)(A)) and the additional allegation a principal was armed with a handgun during the commission of the offense (§ 12022, subd. (a)(1)).² The trial court sentenced Lyman to life without parole pursuant to section 190.5, subdivision (b), plus one year for the firearm-use enhancement. We affirmed Lyman's conviction on appeal. (*People v. Lyman* (July 20, 1999, B120964) [nonpub. opn.].)

On January 8, 2019 Lyman, representing himself, filed a form petition/declaration in superior court to vacate his conviction and to be resentenced in accordance with recent statutory changes relating to accomplice liability for murder. Lyman requested, and the superior court appointed, an attorney to represent Lyman.

¹ Statutory references are to this code.

² The jury deadlocked on the second degree robbery count (§ 211), as well as the allegation as to both counts that Lyman had personally used a firearm within the meaning of section 12022.5, subdivision (a).

The People filed an opposition to the petition; Lyman filed a reply. Following supplemental briefing and oral argument, the superior court denied the petition, finding Lyman ineligible for sentencing relief under section 1170.95 because “it is more reasonable and probable that Mr. Lyman was the actual killer,” and, even if not the actual killer, he had been a major participant in the robbery and had acted with reckless indifference to human life. As the superior court explained, Lyman “is the first one that produces a gun. . . . He tells them to get down on the ground . . . where then [the victim] is shot, according to witness testimony, by Mr. Lyman. . . . The court finds it irrelevant that somebody else could have finished off” the victim.

DISCUSSION

1. *Senate Bill No. 1437 and the Right To Petition To Vacate Certain Prior Convictions for Murder*

Senate Bill No. 1437 (2017-2018 Reg. Sess.) (Stats. 2018, ch. 1015) (Senate Bill 1437), effective January 1, 2019, amended the felony murder rule and eliminated the natural and probable consequences doctrine as it relates to murder through amendments to sections 188 and 189. New section 188, subdivision (a)(3), provides, “Except as stated in subdivision (e) of Section 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime.”

New section 189, subdivision (e), in turn, provides with respect to a participant in the perpetration or attempted perpetration of a felony listed in section 189, subdivision (a), in which a death occurs—that is, as to those crimes that provide the basis for the charge of first degree felony murder—that the

individual is liable for murder “only if one of the following is proven: [¶] (1) The person was the actual killer. [¶] (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree. [¶] (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2.”

Senate Bill 1437 also permits, through new section 1170.95, an individual convicted of felony murder or murder under a natural and probable consequences theory to petition the sentencing court to vacate the conviction and be resentenced on any remaining counts if he or she could not have been convicted of murder because of Senate Bill 1437’s changes to the definition of the crime. The petition must include a declaration by the petitioner that he or she is eligible for relief under this section, the superior court case number and year of the petitioner’s conviction and a statement whether the petitioner requests the appointment of counsel. (§ 1170.95, subd. (b)(1); see *People v. Verdugo* (2020) 44 Cal.App.5th 320, 326-327, review granted March 18, 2020, S260493 (*Verdugo*).)³

³ The Supreme Court in *Verdugo, supra*, S260493 ordered briefing deferred pending its disposition of *People v. Lewis* (2020) 43 Cal.App.5th 1128, review granted March 18, 2020, S260598. The Court limited briefing and argument in *People v. Lewis* to the following issues: “(1) May superior courts consider the record of conviction in determining whether a defendant has made a prima facie showing of eligibility for relief under Penal Code section 1170.95? (2) When does the right to appointed counsel arise under Penal Code section 1170.95, subdivision (c)?”

If the petition contains all required information, section 1170.95, subdivision (c), prescribes a two-step process for the court to determine if an order to show cause should issue: “The court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section. If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner. The prosecutor shall file and serve a response . . . and the petitioner may file and serve a reply If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause.” (*Verdugo, supra*, 44 Cal.App.5th at p. 327.)

Once the order to show cause issues, the court must hold a hearing to determine whether to vacate the murder conviction and to recall the sentence and resentence the petitioner on any remaining counts. (§ 1170.95, subd. (d)(1); see *Verdugo, supra*, 44 Cal.App.5th at p. 327.) At the hearing the prosecution has the burden of proving beyond a reasonable doubt that the petitioner is ineligible for resentencing. (§ 1170.95, subd. (d)(3).) The prosecutor and petitioner may rely on the record of conviction or offer new or additional evidence to meet their respective burdens. (See *People v. Lewis* (2020) 43 Cal.App.5th 1128, 1136, review granted Mar. 18, 2020, S260598.)

2. *The Superior Court Properly Ruled Lyman Did Not Make the Required Prima Facie Showing of Entitlement To Relief*

We appointed counsel to represent Lyman on appeal. After reviewing the record, counsel filed a brief raising no issues. On January 9, 2020 we notified Lyman that he had 30 days to submit a brief or letter raising any grounds of appeal, contentions

or arguments he wanted the court to consider. We received no response.

Based on its consideration of Lyman's petition, the People's opposition and Lyman's reply, as well as our decision affirming his conviction, the superior court properly concluded Lyman was ineligible for relief under section 1170.95. As we explained when rejecting Lyman's argument concerning instructional error regarding aider and abettor liability for felony murder, the jury necessarily found he was the actual killer: "Under CALJIC No. 8.27, a defendant would be guilty of first degree murder if he participated either directly or as an aider and abettor in a robbery during which another participant killed the victim. That was not the theory of the prosecution; it did not argue that theory to the jury nor did it seek an instruction thereon. The prosecution's theory of first degree murder was that defendant was the actual killer and either premeditated the killing or killed Davis in the course of a robbery. The prosecution did not argue that defendant was vicariously liable for a killing performed by another and the trial court had no sua sponte duty to instruct on additional theories of guilt not requested or pursued." (*People v. Lyman, supra*, B120964.)

We have examined the entire record and are satisfied Lyman's appellate attorney has fully complied with the responsibilities of counsel and no arguable issue exists. (*Smith v. Robbins* (2000) 528 U.S. 259, 277-284; *People v. Kelly* (2006) 40 Cal.4th 106, 118-119; *People v. Wende* (1979) 25 Cal.3d 436, 441-442; *People v. Serrano* (2012) 211 Cal.App.4th 496, 503.)

DISPOSITION

The postjudgment order denying Lyman's petition is affirmed.

PERLUSS, P. J.

We concur:

SEGAL, J.

FEUER, J.